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SUPREME COURT, U. S.

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1971

No. _____

EDWARD GRIMES,

Petitioner,

v.

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA AND THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

McPHERSON BERRIEN E. MOORE,
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

The Petitioner, EDWARD GRIMES, respectfully prays that a Writ of Certiorari be issued to review the final judgment of the Court of Appeal of the State of California for the Second Appellate District entered in the above matter on January 6, 1972

OPINIONS BELOW

The written decision of the Department of Alcoholic Beverage Control revoking Petitioner's license set forth in Apendix A. The opinion of the Alcoholic Beverage Control Appeals Board affirming the suspension set forth in Appendix B. The order of the Court of Appeal for the State of California, Second Appellate District, denying the Petition for Writ of Review as set forth in Appendix C. The order of the Supreme Court of the State of California denying a hearing as set forth in Appendix D.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

May the California Department of Alcoholic Beverage Control constitutionally premise revocation of a license upon a violation of §288a of the California Penal Code which makes illegal any act of oral copulation?

STATUTORY PROVISIONS INVOLVED

Section 288a of the California Penal Code which provides in relevant part as follows:

> "Any person participating in an act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in a state prison for not exceeding fifteen years, or by imprisonment in the county jail not to exceed one year; provided, however, whenever any person is found guilty of the offense specified herein, and it is charged and admitted or found to be true...that he has compelled the other's participation in such an act by force, violence, duress, menace, or threat of great bodily harm, he shall be punished by imprisonment in the state prison for not less than three years..."

STATEMENT OF THE CASE

Petitioner has been and now is the holder of an on-sale beer license issued by the California Department of Alcoholic Beverage Control (ABC) for the premises located at 10809 South Vermont Avenue, Los Angeles, California. Said premises are known as and do business as The Circle.

On November 13, 1970 an accusation was filed which alleged that Petitioner had, on or about October 8, 1970, suffered and permitted his licensed premises to be used as a place wherein persons engaged in conduct contrary to public welfare or morals. Said accusations also alleged that the conduct was in violation of §288a of the California Penal Code. The accusation was served upon Petitioner on or about November 17, 1970.

On December 24, 1970 Petitioner duly filed a Notice of Defense and Special Notice of Defense under §11506(a) of the California Government Code.

On April 7, 1971 a hearing was held on the accusation before Jerome Schwimmer, a hearing officer of the California office of Administrative Procedure duly

appointed to hear the case. On April 9, 1971 the hearing officer rendered his proposed decision to A.B.C. in which he found that the matters set forth in the accusation were true and that Petitioner had permitted violations of §288a of the Penal Code and §24200(a) of the Business and Professions Code to occur on the licensed premises. The proposed decision recommended that Petitioner's license be revoked. On April 22, 1971 A.B.C. adopted the proposed decision as its own.

On May 18, 1971 Petitioner duly filed a petition for reconsideration with A.B.C. which was denied on May 24, 1971.

On May 28, 1971 Petitioner duly filed a Notice of Appeal from the decision of the A.B.C. to the Alcoholic Beverage Control Appeals Board of the State of California.

On December 3, 1971 the Appeals Board issued its decision and opinion affirming A.B.C.'s order revoking Petitioner's license.

On December 31, 1971 Petitioner filed a Petition for Writ of Review with the

Court of Appeal of the State of California for the Second Appellate District. On January 6, 1972 the Court of Appeal issued its order denying the writ.

On January 14, 1972 Petitioner filed a Petition for Hearing to the Supreme Court of the State of California. On February 3, 1972 the Supreme Court issued its order denying a hearing in said case.

REASONS RELIED ON FOR ALLOWANCE FOR WRIT

I

SECTION 288a OF THE CALIFORNIA PENAL CODE IS UNCONSTITUTIONAL AND MAY NOT BE THE BASIS FOR REVOCATION OF AN ALCOHOLIC BEVERAGE LICENSE.

The findings of fact contained in the Department's decision was supported by substantial evidence. Those findings are as follows:

"On or about October 8, 1970, . . .

1. . . . a female entertainer, Ruth Ann Richards, while on a stage did lie in front

of a male patron, Ronald Edgar Hill, and did permit said patron to copulate his mouth with said entertainer's sexual organ.

2. . . . a female entertainer, Linda Maxine Ward, while on a stage did lie in front of a male patron, Ronald Edgar Hill, and did permit said patron to copulate his mouth with said entertainer's sexual organ."

In its decision, the Department found that acts of oral copulation had occurred at Petitioner's licensed premises between female entertainers and a member of the audience. The decision further found that said acts constituted violations of both §288a of the Penal Code and §24200(a) of the Business and Professions Code. It is Petitioner's contention that §288a of the Penal Code is unconstitutional and that the Department's decision cannot stand since it is based upon a finding of a violation thereof.

Section 288a of the Penal Code provides as follows:

> "Any person participating in an act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the state prison for not exceeding 15 years, or by imprisonment in the county jail not to exceed one year; provided, however, whenever any person is found guilty of the offense specified herein, and it is charged and admitted or found to be true. . . that he has compelled the other's participation in such an act by force, violence, duress, menace, or threat of great bodily harm, he shall be punished by imprisonment in the state prison for not less than three years. . ."

Thus, it is clear from the face of the statute that a violation of §288a can be committed even though there is no

threat or coercion and the persons are acting voluntarily with respect to one another. Moreover, the statute denounces acts of oral copulation taking place in private as well as in public. People v. Butterwick, 258 Cal.App.2d 586, 65 Cal. Rptr. 765 (1968); People v. Hensel, 233 Cal.App.2d 834, 43 Cal.Rptr. 865. No particular intent is required to obtain the conviction of persons engaging in oral copulation. People v. Giani, 145 Cal.App.2d 539, 302 P.2d 813 (1956).

In a recent case, a three-judge District Court in the State of Texas held unconstitutional the Texas sodomy statute upon the ground that it did not distinguish between public and private acts or between acts of married and unmarried persons, and that it plainly applied to private consensual acts of married persons and homosexuals. The court found that the Texas sodomy statute was an unconstitutional invasion of privacy under Griswold v. Connecticut, 381 U.S. 379, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) and that the statute was therefore void on its face. Buchanan v. Batchelor, 308 F.Supp. 729

(DC Tex. 1970); rev's on other grounds, subnom. Wade v. Buchanan, 91 S.Ct. 1221 (1971). The findings of the Texas three-judge court in Buchanan v. Batchelor apply equally to the California oral copulation statute, Penal Code §288a. As noted above, §288a clearly applies to private consensual acts.

Although the California Appellate Courts have rejected such arguments to date, none of the opinions involved have addressed themselves to the problems in any detail. The leading case at the present time is People v. Ragsdale, 177 Cal.App.2d 676, 2 Cal.Rptr. 640 (1960). Ragsdale was decided before Griswold. It involved acts of oral copulation between prisoners in a state prison. In upholding §288a against a claim that the statute violated due process as applied to imprisoned persons, the court merely stated:

> ". . .The making of unnatural sexual relations a crime is embedded in the history of the common law and finds its sanction in the broader basis

of the 'settled mores or Western civilization'." People v. Ragsdale, supra, 2 Cal.Rptr. at page 643.

Following the decisions in Griswold, supra, and Robinson v. California, 370 U.S. 660, the attack was again raised in People v. Roberts, 256 Cal.App.2d 488, 64 Cal.Rptr. 70 (1967). In Roberts, the court again upheld the constitutionality of §288a based on Ragsdale. The court rejected the applicability of Griswold and Robinson without argument.

Finally, in People v. Hurd, 5 Cal. App.3d 865, 85 Cal.Rptr. 718 (1970), the court rejected a general attack on the constitutionality of the incest, sodomy and oral copulation statutes in a case in which the defendant was convicted of such acts with his minor daughter. The court relied on the Roberts and Ragsdale decisions and did not analyze the issues.

In Griswold v. Connecticut, supra, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the court overturned a statute which made it illegal to use

contraceptive devices upon the grounds that such a statute invaded the sphere of marital privacy. Griswold was followed in People v. Velous, 71 Cal.2d 954, 80 Cal.Rptr. 354 (1969), which held unconstitutional former §274 of the Penal Code, the abortion statute. The court's decision was based in the first instance upon a holding that the exception permitting an abortion to be performed where necessary to preserve the mother's life was vague and uncertain. In so holding, the court also held that a narrow interpretation of the exception sufficient to satisfy due process grounds would invade the right of a pregnant woman to determine whether or not she wished to have children and identified this as a privacy right. Similarly, §288a of the Penal Code invades the rights of all adults in California to ascertain the form in which they will have sexual relations.

A second reason for the invalidity of §288a of the Penal Code is that it exceeds the police power of the state. In American Motorcycle Association v.

Davids, 158 NW2d 72 (Mich. App. 1968), the Michigan court held unconstitutional a statute which required operators and passengers of motorcycles to wear an approved crash helmet. The court held that the statute served no purpose other than to protect the safety of those on motorcycles and that such a purpose was not within the police power. The court held that a valid statute was required to have a substantial relationship with the public health and safety and that the promotion of the private safety of individuals would not justify such restrictions. A similar result was reached by the Court of Appeal in Louisiana in Everhardt v. City of New Orleans, 208 So.2d 423 (La. Appl. 1968). In stating the issue before it, the court said,

> "We think the most serious issue. . . is whether the exercise of the police power vested in a law making body extends to forcing a citizen to protect his own well-being, or whether it is limited to regulation of

individual conduct when that conduct might effect the well-being of other persons in the community." Everhardt v. City of New Orleans, supra, 208 So.2d at pages 424-425.

In many potential applications, §288a of the Penal Code does nothing more than make criminal the private moral choices of individuals, which choices can have no possible bearing on the rights, health, well-being or morals of others. This being the case, the statute exceeds the boundaries of the police powers of the state and is unconstitutional.

Since the Department's decision is based in part upon a finding that a violation of §288a occurred, the decision should be reversed and remanded to the Department for further consideration.

II

CONCLUSION

For the reasons stated herein the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

McPHERSON BERRIEN E. MOORE
KENNETH SCHOLTZ

Attorneys for Petitioner

APPENDIX A

STATE OF CALIFORNIA

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

150 Folios

IN THE MATTER OF THE ACCUSATION Against:	File 30714 Reg. 11725 Licenses: 40
EDWARD GRIMES The Circle 10809 S. Vermont Avenue Los Angeles	Time of Hearing: 4-7-71 9:00 a.m.
On-Sale Beer	Place of Hearing: 314 W. First St., L.A.
Respondent	Reporter: Bea Taft OLA 25450
	Appearances: For Dept: Doris Jaffe, Assoc. Counsel
	For Resp: Kenneth Scholtz Attorney 1515 Redondo Beach Blvd. Gardena, Calif. 90247 (Respondent not present)
under the Alcoholic Beverage Control Act	

I hereby certify that the following constitutes my proposed decision in the above-entitled matter as a result of the hearing held before me at the above time and place, after due notice thereof having

been given according to law, and I hereby recommend its adoption as the decision of the Department of Alcoholic Beverage Control.

PROPOSED DECISION

FINDINGS OF FACT:

COUNT I

On October 8, 1970, respondent-licensee, by and through his agents, employees and servants, Ruth Ann Richards and Linda Maxine Ward, did suffer and permit the above-designated licensed premises to be used as a place wherein persons engaged in conduct and activity which did, create conditions then and there contrary to public welfare and morals, in that:

1. On said date, a female entertainer, Ruth Ann Richards, while on a stage did lie in front of a male patron, Ronald Edgar Hill, and did permit said patron to copulate his mouth with said entertainer's sexual organ.

2. On said date, a female entertainer, Linda Maxine Ward, while on a stage

did lie in front of a male patron, Ronald Edgar Hill, and did permit said patron to copulate his mouth with said entertainer's sexual organ.

FINDINGS RE SPECIAL DEFENSE:

Each and all of the objections raised by respondent in his special notice of defense have been considered by the Hearing Officer and are hereby each and all overruled.

DETERMINATION OF ISSUES PRESENTED:

Respondent did permit violations of Section 288a of the Penal Code and Section 24200(a) of the Business and Professions Code to occur on the licensed premises.

Grounds for the suspension or revocation of respondent's license exist pursuant to Sections 24200(a) and (b) of the Business and Professions Code and Article XX, Section 22 of the California Constitution.

PENALTY OR RECOMMENDATION:

The license is revoked.

Dated at Los Angeles, California, April 9, 1971.

APPENDIX B

Filed
Dec 3 1971
Alcoholic Beverage
Control Appeals Board

BEFORE THE ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD OF THE
STATE OF CALIFORNIA

In the Matter of the Accusation against EDWARD GRIMES dba The Circle 10809 S.Vermont Avenue Los Angeles Respondent & Licensee under the Alcoholic Beverage Control Act.	AB-3681 File No. 30714; Reg. No. 11725; H/O: Schwimmer Time & Place of Hearing: October 29, 1971,at 10 a.m. 314 West First Street Los Angeles, Calif. For Department: Honorable Evelle J. Younger Attorney General Daniel Weston Deputy Attorney General For Appellant: Kenneth Scholtz,Esq.

This appeal concerns a decision of the Department of Alcoholic Beverage Control ordering the revocation of appellant's on-sale beer license for premises located at 10809 South Vermont Avenue, Los Angeles. The department determined that appellant permitted violations of section 288a, Penal

Code (perversion, oral copulation), and section 24200(a), Business and Professions Code, to occur on the licensed premises.

Appellant's appeal is based upon the following:

"(a) The Department has proceeded without, and in excess of, its jurisdiction;

"(b) The decision is not supported by the findings;

"(c) That errors of law were made by the Hearing Officer, as reflected by the transcript of the proceedings;

"(d) The findings are not supported by substantial evidence in the light of the whole record."

The department's decision contains the following:

"FINDINGS OF FACT:

"COUNT I

"On October 8, 1970, respondent-licensee, by and through his agents, employees and servants Ruth Ann Richards and Linda Maxine Ward, did suffer and

permit the above-designated licensed premises to be used as a place wherein persons engaged in conduct and activity which did, create conditions then and there contrary to public welfare and morals, in that:

"1. On said date, a female entertainer, Ruth Ann Richards, while on a stage die lie in front of a male patron, Ronald Edgar Hill, and did permit said patron to copulate his mouth with said entertainer's sexual organ.

"2. On said date, a female entertainer, Linda Maxine Ward, while on a stage did lie in front of a male patron, Ronald Edgar Hill, and did permit said patron to copulate his mouth with said entertainer's sexual organ.

"FINDINGS RE SPECIAL DEFENSE:

"Each and all of the objections raised by respondent in his special notice of defense have been considered

by the Hearing Officer and are hereby each and all overruled.

"Grounds for the suspension or revocation of respondent's license exist pursuant to Sections 24200(a) and (b) of the Business and Professions Code and Article XX, Section 22 of the California Constitution."

At the department hearing held on April 7, 1971, Deputy Sheriff Richard Zimbel testified as to the following conversation he had with two males:

"A I was talking to two Negro men I met on Imperial Boulevard near Central. We had a conversation about the goings-on in the area, and one of the men said, 'If you guys want to eat some pussy on stage, come with us.' And Deputy Ward, who was with me, stated, 'Where is it at?' He said, 'Follow us, if you're not chicken shit.' So we followed them to the Circle Bar."

(R.T. 2:22-27.)

The deputy testified that he entered appellant's premises at approximately 11:25 p.m.

with the two male Negroes and Deputies Ward and Holland. He described the premises and the interior lighting; that the five males paid $3 each to enter the premises; that the payment was made to a doorman who was subsequently identified as Mr. Winkie, the manager of the premises; and that the ticket given to them at the time they paid the $3 was good for one beer. Deputy Zimbel testified that there were approximately seven male patrons in the premises at the time he entered; he testified as follows with respect to his observations of the two entertainers named in the department's accusation:

"Q Would you relate your observations of Ruth Ann Richards?

"A When I first came into the location, she was seated on a chair that was against what appeared to be a wall with the stage. The music started to play, and she started to dance. She was wearing a pair of white boots and a belt around her middle. That was all she was wearing. She started to bump and gyrate her hips. The music played for approximately

a minute, and a patron, later identified as Edgar Hill, put a dollar down in front of him on the bar. Miss Richards picked up the dollar, put her legs down on the serving bar and started to gyrate in front of Mr. Hill.

"She opened her legs and he put his head forward towards her vaginal lips. He stuck his tongue out and put his face forward and put his tongue in her vaginal area. Then he leaned forward and put his face inside her vaginal area for the completion of the record, at which time when the record was completed, she got up. There was a roll of towels on the stage and she took a towel and wiped her vaginal area and sat down again.

"Q Did you see Mr. Hill insert his tongue in her vagina?

"A Yes, I did.

"Q How long did you see him in that position?

"A Approximately two minutes.

"Q Did you hear any comments

from other persons in the premises during that activity?

"A There was a man seated to his left who was laughing and slapping the bar, and he got up -- Mr. Hill was wearing a little short-billed cap, and he walked over and he turned the cap around on the back of Mr. Hill's head. . . ."

* * *

"A Miss Richards got up and said, 'Baby, eat it again.' Mr. Hill threw another dollar down on the bar, and Miss Richards assumed the same position in front of Mr. Hill, at which time he had oral copulation with her again to the complete record.

"Q About how long was that?

"A Almost three minutes.

"Q Did you see where he put his tongue during the second --

"A Yes. He placed it in between her -- in her vaginal area and he inserted it into her vagina.

"Q Then what did he do with his face?

"A His face came forward, and I couldn't see the front portion of it. It was buried in her vaginal area."

(R.T. 5:14-28; 6:1-12; 7:6-17.)

As to the second incident involving Linda Maxine Ward, he testified:

"A After the record, the second, had completed, Miss Richards wiped herself again and left the stage and Miss Ward came up.

"Q. What was she wearing?

"A She was wearing a belt around the middle and a pair of black boots.

"Q What did she do?

"A She started to dance and gyrate to a record, and she gyrated her hips, pushed her pelvic area forward, turned over on her back, and her anus area was moving to and fro, and she gyrated that to a point where it opened. Mr. Hill placed a dollar down and she assumed the same position in front of him as Miss Richards did.

"Q What happened when she assumed that position?

"A He placed his tongue in her vaginal area, pushed his face forward, and he orally copulated her.

"Q How long did you see him doing this?

"A For the rest of the portion of that record; that would probably be a minute and a half."

(R.T. 9:4-22.)

A rough sketch of the premises showing the location of the parties involved was introduced into evidence. (Department exhibit 1.)

In argument to this board, appellant states that the question presented is whether the department may premise revocation of the license upon a violation of section 288a of the Penal Code. It is appellant's contention that such may not be done as section 288a, Penal Code, is unconstitutional and may not be the basis for revocation of an alcoholic beverage license. We find no merit in appellant's argument.

In our opinion, the department's findings are supported by substantial evidence and the findings support the department's decision. (Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control (1970), 2 Cal.3d 85.)

In view of the foregoing, the decision of the Department of Alcoholic Beverage Control in the present proceeding is hereby affirmed.

HUGH M. BURNS, CHAIRMAN
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

We Concur:

Eugene V. Lipp

Kay Valory

Sacramento, California
November 26, 1971

STATE OF CALIFORNIA
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
CERTIFICATE OF DECISION

File 30714
Reg. 11725

It is hereby certified that a Hearing Officer of the Office of Administrative Procedure having submitted the attached proposed decision, and the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommended penalty, adopted said proposed decision as its decision in the case therein described on April 22, 1971.

A representative of the Department will call on you on or after June 10, 1971 to pick up the license certificate.

Sacramento, California
Dated: April 22, 1971

/s/ Dorothy Pierson
Hearing and Legal Unit

ABC-132 (1-67)

APPENDIX C

Los Angeles, Cal. JAN 6 - 1972, 19___

TITLE { EDWARD GRIMM, etc. / Dept. of A.B.C. } No. 39594

The Court

PETITION FOR WRIT OF REVIEW DENIED

CLAY ROBBINS, Clerk

81607-112 8-71 5M ⓐ OSP

APPENDIX D

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

FEB 3 1972

Sir: I have this day filed Order

FEB 1 1972

BERRIEN E. MOORE, JR.

HEARING DENIED

2 Civ. No. 39594

Grimes

vs.

Alcoholic Beverage Control

Respectfully,

G. E. BISHEL
Clerk